A

PP

v.

WONG KONG YEW & ORS

B

HIGH COURT SABAH & SARAWAK, SIBU
YEW JEN KIE J
[CRIMINAL APPEAL NO: SB-42-7-2011]
5 APRIL 2012

C ***CONSTITUTIONAL LAW:*** *National language - Use of National language in petition of appeal - Whether petition should have been filed in English language - Whether in breach of art. 161(2)(b) Federal Constitution which confers additional protections for states of Sabah & Sarawak - Provision of - Whether appellant merely pursuing its right to* D *appeal as provided under Part VII Criminal Procedure Code - Whether petition defective*

CRIMINAL PROCEDURE: *Appeal - Petition of appeal - Use of National language in petition of appeal - Whether petition should have* E *been filed in English language - Whether in breach of art. 161(2)(b) Federal Constitution which confers additional protections for states of Sabah & Sarawak - Provision of - Whether appellant merely pursuing its right to appeal as provided under Part VII Criminal Procedure Code - Whether petition defective*

F This was an appeal by the public prosecutor ('appellant') against the decision of the learned sessions court judge in acquitting and discharging the accused persons ('respondents'). In light of this appeal, the 5th respondent raised a preliminary objection alleging that the petition of appeal filed in the national language was G defective on the grounds that there was a breach of: (i) art. 161(2)(b) of the Federal Constitution (Part XIIA – additional protections for states of Sabah and Sarawak) and (ii) Point 2C of the 20-Point Malaysia Agreement ('Malaysia Agreement'). The 5th respondent contended that the spirit of art. 161(2)(b) of the H Federal Constitution and the Malaysia Agreement on the use of English language in proceedings in the High Court of Sabah and Sarawak was also reflected in O. 92 r. 1(2) of the Rules of the High Court 1980 ('RHC'). Further, with reference to the case of *Dato' Seri Anwar Ibrahim v. Tun Dr Mahathir Mohamad*, the 5th I respondent submitted that the petition of appeal must have been filed in the English language.

Held (dismissing the 5th respondent's preliminary objection):

(1) In filing the petition of appeal, the appellant was merely pursuing its right to appeal as provided under Part VII of the Criminal Procedure Code ('CPC'), in particular s. 307(5) which requires the appellant to lodge with the clerk of the court a petition of appeal within ten days after the copy of the grounds of decision has been served. (para 9)

(2) From the reading of s. 307(6) CPC, a petition of appeal is a succinct statement of the grounds upon which the appellant proposes to support the appeal. It is a notice to the court wherein specific grounds are proposed to be urged on behalf of the appellant, and also a notice to the respondent that he should be ready to meet those specific grounds. Further, the petition of appeal was not filed for use in pursuant of the rules in the RHC. Thus, O. 92 r 2 RHC was of no help to the 5th respondent. (paras 10 & 19)

(3) The intention of the appellant in filing the petition of appeal was to comply with s. 307(5) and (6) CPC so as to convey to the court as well as the 5th respondent the grounds upon which it proposes to support the appeal. It was not a backdoor attempt to steal the fundamental constitutional rights. (para 11)

(4) The case of *Dato' Seri Anwar Ibrahim (supra)* was distinguished on the facts of this case whereby the memorandum of appeal in that case was filed pursuant to r. 18 of the Rules of the Court of Appeal 1994 ('RCA'). Given the word "shall" that appears in s. 8 of the National Language Acts 1963/67 ('Act') and r. 101 RCA, the memorandum of appeal in the English language filed by the appellant in the said case was doomed to suffer the ill fate of being invalid. It is a fact that the Act has yet to be extended to Sabah and Sarawak. (paras 21, 23, 24, 26 & 27)

(5) A careful reading of the CPC shows that there is no provision in it which states that any document filed for use in pursuance of it shall be in the English language. There was no reason why a petition of appeal could not be drafted in the Malay language, which is our national language. Thus, a petition of appeal in the national language does not render it defective. (paras 20 & 29)

Case(s) referred to:

Dato' Seri Anwar Ibrahim v. Tun Dr Mahathir Mohamad [2010] 1 CLJ 444 CA ***(dist)***

Kunn Rekon Holdings Sdn Bhd v. PP & 2 Other Applications [1996] 2 CLJ 689 HC ***(refd)***

PP v. Abdullah Idris [2009] 5 CLJ 445 CA ***(refd)***

PP v. Arab Malaysian Finance Bhd [2003] 4 CLJ 243 HC ***(refd)***

Syarikat Telekom Malaysia Bhd lwn. Business Chinese Directory Sdn Bhd [1993] 3 CLJ 629 HC ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 307(4), (5), (6)
Federal Constitution, art. 161(2)(b)
National Language Acts 1963/67, s. 8
Rules of the Court of Appeal 1994, rr. 18, 101(2)
Rules of the High Court 1980, O. 92 rr. 1(2), 2

Other source(s) referred to:

Sohoni's The Code of Criminal Procedure, 16th edn, vol III, p 2520

For the appellant - Robert Pasang Alam DPP
For the respondent - Orlando Chua; M/s Wong, Orlando Chua & Kuok Advocates

Reported by Kumitha Abd Majid

JUDGMENT

Yew Jen Kie J:

[1] The eight respondents were on 18 March 2011 at the close of the case for the prosecution, acquitted and discharged by the learned Sessions Court Judge without being called upon to enter their defence.

[2] The appellant appealed against the decision of the learned Sessions Court Judge.

[3] By letter dated 6 January 2012, the 5th respondent gave notice to the appellant of his intention to raise a preliminary objection pertaining to the defective petition of appeal dated 17 June 2011.

[4] The preliminary objection is premised on two principal grounds as follows:

a. that the petition of appeal which is in the national language is in breach of art. 161(2)(b) of the Federal Constitution (Part XIIA – Additional Protections for States of Sabah and Sarawak).

b. that the petition of appeal is in breach of Point 2C of the 20-Point Malaysia Agreement.

[5] For ease of reference, the relevant provisions in the Federal Constitution are reproduced as follows:

(i) PART XIIA

ADDITIONAL PROTECTIONS FOR STATES OF SABAH AND SARAWAK

Use of English and of native language in states of Sabah and Sarawak

161. (1) No Act of Parliament terminating or restricting the use of the English language for any of the purposes mentioned in Clauses (2) to (5) of Article 152 shall come into operation as regards the use of the English language in any case mentioned in Clause (2) of this Article until ten years after Malaysia Day.

(2) Clause (1) applies:

(b) to the use of the English language for proceedings in the High Court in Sabah and Sarawak or in a subordinate court in the State of Sabah or Sarawak, or for such proceedings in the Federal Court or the Court of Appeal as are mentioned in Clause (4);

(ii) Article 152 under Part XII GENERAL AND MISCELLANEOUS of the Federal Constitution states, where relevant:

National Language

152 (1) The national language shall be the Malay language and shall be in such script as Parliament may by law provide:

(2) to (3) ... [not applicable].

A (4) Notwithstanding the provisions of Clause (1), for a period of ten years after Merdeka Day, and thereafter until Parliament otherwise provides, all proceedings in the Federal Court, the Court of Appeal or a High Court shall be in the English Language:

B Provided that, if the Court and counsel on both sides agree, evidence taken in the language spoken by the witness need not be translated into or recorded in English.

(iii) Point 2C of the Malaysia Agreement states that English should be the official language of Borneo (Sarawak & Sabah) C for all purposes, State or Federal, without limitation of time.

[6] Learned counsel for the 5th respondent contended that the constitutional rights guaranteed by the supreme law of the land, *viz.* the Constitution, to the people of Sabah and Sarawak D pursuant to both art. 161(2) of the Federal Constitution (Part XIIA-Additional Protection for States of Sabah and Sarawak) and Point 2C of the 20-Point Malaysia Agreement, must be guarded jealously, "lest anyone might stealthily creep in, in the darkest of night, like a thief, to steal away those fundamental rights from E right under our nose."

[7] Part XIIA of the Federal Constitution gives additional protections for States of Sabah and Sarawak. Clause 2 of art. 161 of the Federal Constitution must be read together with cl. 1. The F purpose of cl. 1 is to postpone an Act of the Parliament ie, the National Language Acts 1963/67 restricting and terminating the use of English Language in the proceedings in the Federal Court, the Court of Appeal or High Court from coming into operation as regards the use of English Language for proceedings in the High G Court, subordinate court in Sabah and Sarawak, or such proceedings in the Federal Court or the Court of Appeal as are mentioned in clause (4) (see cl. 2) until ten years after Malaysia Day.

H **[8]** The submission of learned counsel invites the questions: is the petition of appeal herein itself an Act of Parliament that seeks to abolish the use of English Language in the court proceedings in Sabah and Sarawak? Is the prosecution trying to use the petition of appeal as a backdoor to introduce an Act or bring into I operation the National Language Act?

[9] To my mind, the answers are in the negative. In filing the petition of appeal herein, the prosecution is merely pursuing its right to appeal as provided under Part VII of the Criminal Procedure Code, in particular, s. 307(5) which requires the appellant to lodge with the clerk of the court a petition of appeal within ten days after the copy of the grounds of decision has been served.

[10] From the reading of s. 307(6) of the Criminal Procedure Code, a petition of appeal is a succinct statement of the grounds upon which the appellant proposes to support the appeal. It is a notice to the court that such and such specific grounds are proposed to be urged on behalf of the appellant, and also a notice to the respondent that he should be ready to meet those specific grounds. See also, *Sohoni's The Code of Criminal Procedure,* 16th edn, vol III, p. 2520.

[11] Thus, the intention of the appellant in filing the petition of appeal is to comply with s. 307(5) and (6) of the Criminal Procedure Code so as to convey to the court as well as the 5th respondent the grounds upon which the appellant proposes to support the appeal. It is not a backdoor attempt to "steal" the "fundamental Constitutional right" as contended by the 5th respondent.

[12] Thus, the contention of the 5th respondent so far as it is premised on art. 161(2) of the Federal Constitution or Point 2C of Malaysia Agreement holds no water.

Order 92 r. 1 Rules Of The High Court (RHC)

[13] Order 92 r. 1(2) RHC states:

> For Sabah and Sarawak, any document required for use in pursuance of these rules shall be in the English language and may be accompanied by a translation thereof in the national language except that the translation for the purpose of Order 1, rule 6(4) and rule 7(1) must be prepared in accordance with rule 6(5) of the Order;
>
> Provided that any document in the national language may be used as an exhibit, with or without a translation thereof in the English language.

[14] Learned counsel for the 5th respondent submitted that the spirit of art. 161(1)(2)(b) and Malaysia Agreement Point 20C on the use of English language in proceedings in the High Court in Sabah and Sarawak is also reflected in O. 92 r. 1(2) Rules of the High Court 1980 (RHC).

[15] To press home the point that the Rules of the High Court 1980 are operative and apply equally to both civil and criminal proceedings, *PP v. Arab Malaysia Finance Bhd* [2003] 4 CLJ 243 (HC) was cited. In that case, the Court, in considering whether the sessions court acted properly in reinstating the application, a criminal matter or proceeding, referred to *Kunn Rekon Holdings Sdn. Bhd. v. PP & 2 Other Applications* [1996] 2 CLJ 689, where Low Hop Bing J (as he then was), after considering no less than three Supreme Court decisions on the mater, held that the Rules of the High Court 1980 are operative and apply equally to both civil and criminal proceedings.

[16] Reference was also made to *PP v. Abdullah Idris* [2009] 5 CLJ 445, which, submitted learned counsel, reinforces the above view. Further, r. 101(2) Rules of the Court of Appeal 1994, which is almost in *pari material* with O. 92 r. 1(2) RHC.

[17] To further support the contention, learned counsel cited *Syarikat Telekom Malaysia Bhd lwn. Business Chinese Directory Sdn. Bhd.* [1993] 3 CLJ 629 (HC), which dealt with O. 92 r. 1 RHC and the issue whether all court documents in that case should be in the national language. The court in ruling that the telephone directory which was not in the national language was inadmissible, held:

> The Rules of Court requiring documents to be Bahasa Malaysia are mandatory in nature.

[18] It is important to note the operative words of r. 2 of O. 92 RHC, "any document required for use in pursuance of these rules". The question is posed: is the petition of appeal herein filed for use in pursuance to the rules in the Rules of High Court?

[19] As the court has stated earlier, the petition of appeal herein is filed pursuant to the expressed provision in s. 307(4) and (5) under Part VII of the Criminal Procedure Code. It is not filed for use in pursuant of the rules in the Rules of High Court. Thus, O. 92 r. 2 RHC is of no help to the 5th respondent.

[20] Additionally, a careful reading of the Criminal Procedure Code shows that there is no provision in the Code that says any document filed for use in pursuance of the Code shall be in English Language. There is no reason why a petition of appeal cannot be drafted in Malay language, which is our National Language. Thus, a petition of appeal in the National Language does not render it invalid.

Is Petition Of Appeal In English Language Defective?

[21] Learned counsel for the 5th respondent also cited a recent case of *Dato' Seri Anwar Ibrahim v. Tun Dr. Mahatir Mohamad* [2010] 1 CLJ 444, where the Memorandum of Appeal was drafted solely in the English language when the Malay language is the *lingua franca* of the courts in West Malaysia. The Court of Appeal, in striking out the appellant's appeal, made the following observations:

> Factually speaking, the absence of the memorandum of appeal in the National language renders the record of appeal filed by the appellant incurably defective and consequently, the appellant's appeal herein should be dismissed with costs for the simple reason that there is no proper record of appeal before this court. It is as simple as that.
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> …
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> We observe that the word 'shall' appears in s. 8 of the National Language Acts 1963/1967 (Act 32). Likewise, the word 'shall' also appears in r. 18(1) and r. 101 of the Rules of the Court of Appeal 1994. It is quite obvious that the use of the word 'shall' raises a presumption that the particular provision is imperative … and it is also ordinarily mandatory. It is also correct to say that when a statute uses the word 'shall', *prima facie* it is mandatory. And once it is held to be mandatory, the failure to comply with it will invalidate anything done under the statute.
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> …
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> Thus, the failure on the part of the appellant to file a memorandum of appeal in Bahasa Malaysia renders the purported record of appeal filed by the appellant useless. It will not qualify as a record of appeal. It is our judgment that there is no proper or competent appeal before us.

[22] In a reverse argument, learned counsel for the 5th respondent submitted that the petition of appeal must be in English language. The complaint raised by the 5th respondent is no mere technicality as alleged by the appellant. It concerns the supreme law of the land, like in the case of *Dato' Seri Anwar Ibrahim v. Tun Dr. Mahathir Mohamad (supra), viz.* art. 161(2)(b) of the Federal Constitution [Part XIIA – Additional Protections for States of Sabah and Sarawak] and the protection intended to be given to the people of Sarawak under Point 2C of the 20-Point Malaysia Agreement. It was submitted that a petition of appeal in national language is defective. As a result, there is no proper or competent petition before the court.

[23] In my view, *Dato's Seri Anwar Ibrahim*'s case, *supra*, is distinguishable.

[24] In that case, the memorandum of appeal was filed pursuant to r. 18 of the Rules of the Court of Appeal 1994. Rules 101 of the same rule states:

> Any document required for use in pursuance of these Rules shall be in the national language, and may be accompanied by a translation thereof in the English language:
>
> Provided that any document in the English language may be used as an exhibit, with or without a translation thereof in the national language.

[25] Section 8 of the National Language Acts 1963/67 stipulates:

> Language of Courts
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> 8. All proceedings (other than the giving of evidence by a witness) in the Federal Court, Court of Appeal, the High Court or any Subordinate Court shall be in the national language:
>
> Provided that the Court may either of its own motion or on the application of any party to any proceedings and after considering the interests of justice in those proceedings, order that the proceedings (other than the giving of evidence by a witness) shall be partly in the national language and partly in the English language.

[26] Given the word "shall" that appears in s. 8 of the National Language Acts 1963/67 and r. 101 of the Rules of the Court of Appeal 1994, the memorandum of appeal in English Language filed by the appellant in *Dato' Seri Anwar Ibrahim*'s case, *supra*, is doomed to suffer the ill-fate of invalidity.

[27] It is a fact that National Language Acts 1964/67 has yet to be extended to Sabah and Sarawak.

[28] As I have stated earlier, the petition of appeal herein is filed in pursuance to the provisions in the Criminal Procedure Code, in particular, ss. 307(4) and (5). Unlike r. 101 of the Rules of the Court of Appeal, the Criminal Procedure Code does not stipulate that the documents filed in pursuant to the Code shall be in English Language.

[29] This being the case, the petition of appeal in the National Language does not render it defective.

Conclusion

[30] For all the reasons aforesaid, I find no merits in the preliminary objection and accordingly dismiss it.